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Supreme Court, U.S.
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No. 04-814

IN THE

Supreme Court of the United States

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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RULE 29.6 STATEMENT

Petitioner's corporate disclosure statement is set forth at page ii of the petition for certiorari, and there are no amendments to that statement.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. THE NINTH CIRCUIT'S DECISION RAISES THE QUESTION PRESENTED IN SHELL'S PETITION.

Respondents' primary argument against review rests on the baseless claim that "the question presented by Shell ... is not presented in the record of this case." Br. in Opp. 1. Respondents ground this claim on the Ninth Circuit's holding that the pricing decision at issue here might be characterized as having been made by the joint venture partners, Shell and Texaco, rather than by "a single economic entity" (*i.e.*, the joint venture itself). Br. in Opp. 1-2. This is nothing more than a semantic game. If it suits their purposes, antitrust plaintiffs can attempt to characterize virtually any action taken by a joint venture as action taken by the joint venture partners, just as Respondents have here. *See* Br. in Opp. 12 ("the price-fixing challenged in this action was clearly a decision of Shell and Texaco in their exercise of control over the operations of the venture"). But this characterization has no bearing on the issue raised in Shell's petition, which challenges the Ninth Circuit's decision to apply the *per se* rule rather than the rule of reason.

Respondents predicate their semantic claim on the Ninth Circuit's statement, in a single footnote, that "there is at least a triable issue of fact as to whether Texaco and Shell agreed in advance to charge the same price for their two distinct gasoline brands as an initial operating requirement of the alliance." Pet. App. 20a n.11. Respondents contend that, in light of this "factual issue," the pricing decision challenged here might be characterized as having been made by Shell and Texaco through agreement rather than by Equilon itself. But even if Equilon's price setting could be viewed as an "agreement" between Shell and Texaco, the question remains whether the *per se* rule may properly be applied to that

agreement. As Shell has demonstrated, the decisions of this Court and other circuits squarely hold that pricing decisions regarding the output of a joint venture are not subject to *per se* condemnation regardless of whether those decisions are characterized as having been made by the venture or by the venture partners.

Respondents do not address any of the cases cited by Shell on this point. For example, in *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984), this Court declined to apply the *per se* rule to a horizontal agreement on prices that had been adopted, not by a separate management entity, but by a vote of the individual members of the NCAA. *Id.* at 89-104. Similarly, in *National Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986), the Eleventh Circuit refused to apply the *per se* rule to a uniform pricing system adopted by a vote among the competing members of the Visa joint venture. *Id.* at 593-603. And in *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41 (1st Cir. 2001), the plaintiff challenged a joint venture's practice of paying up-front fees to chain retailers. The court stated that the members of the joint venture "might be viewed as acting through [the joint venture] to 'agree' on up-front payments to the buyers" but held the *per se* rule inapplicable because that "agreement" was ancillary to a legitimate joint venture. *Id.* at 48. As these and the other cases cited in Shell's petition demonstrate, courts have consistently refused to apply the *per se* rule to pricing decisions concerning the output of a legitimate joint venture, regardless of whether those pricing decisions were made by the joint venture itself or by the joint venture partners.

In short, the issue raised in Shell's petition does not represent a "reques[t] for this Court to render an advisory opinion on a point the Ninth Circuit never decided," as Respondents wrongly assert. Br. in Opp. 13. The Ninth Circuit squarely held that the pricing "agreement" challenged

here may be subject to the *per se* rule, and that holding warrants this Court's review.

II. RESPONDENTS OFFER NO SUBSTANTIVE RESPONSE TO THE REASONS FOR GRANTING REVIEW SET FORTH IN THE PETITION.

The Ninth Circuit's decision conflicts directly with decisions by other circuits and this Court with respect to what constitutes a naked as opposed to an ancillary restraint. Moreover, the Ninth Circuit's decision, if upheld, would potentially render it *per se* illegal for any joint venture to set the prices of multiple products or services – a result that is already engendering widespread confusion and uncertainty on an issue with national economic repercussions.

A. The Ninth Circuit's Decision Conflicts With Decisions by This Court and Other Circuits With Respect to What Constitutes a Naked Price-Fixing Agreement.

Contrary to Respondents' Opposition (Br. in Opp. 17), the circuit conflict that the Ninth Circuit's decision has spawned is both real and readily apparent. Of course, Respondents are correct that there is no conflict about the existence of a "crucial distinction between *ancillary* restraints, which are subject to the rule of reason, and *naked* restraints, which are illegal *per se*." Br. in Opp. 17 (emphasis added). As Respondents note, the distinction between the two has been around for more than 100 years. Br. in Opp. 20-21 (citing *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899)). The circuit conflict created by the Ninth Circuit's decision concerns not whether a distinction exists but instead what constitutes a naked as opposed to an ancillary restraint.

Courts have uniformly held that an agreement between joint venture partners on the price to be charged for the venture's output is an ancillary restraint, so long as the joint venture is a

legitimate, economically integrated entity and the agreement on price does not extend to any *non*-venture output. *See* Pet. 8-9 (discussing *Augusta News* and *National Bancard*). Both conditions are met here. There is no dispute that Equilon was a *bona fide*, economically integrated joint venture. The district court found that Equilon and Motiva "were plainly not 'fly-by-night' operations designed to cover up an elaborate price-fixing scheme," and the Ninth Circuit agreed that the ventures were a true integration of risks and rewards, conceived for the procompetitive purpose of creating more than $800 million in cost savings and operating efficiencies. Pet. App. 3a, 8a. It is also undisputed that the pricing "agreement" challenged here involved only the pricing of venture output – that is, products that were indisputably manufactured and owned by Equilon. Indeed, the joint ventures were approved by the Federal Trade Commission and several state Attorneys General after a lengthy antitrust review, with full knowledge that each joint venture (rather than a single joint venture partner) would control the pricing of the venture's output.

In light of these undisputed facts, the pricing agreement challenged by Respondents was unquestionably an ancillary restraint subject to rule-of-reason analysis. The circuits have generally defined a restraint as ancillary "when it may contribute to the success of a cooperative venture that promises greater productivity and output" (*Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 189 (7th Cir. 1985)), or when the restraint is "subordinate and collateral to a separate, legitimate transaction … in the sense that it serves to make the main transaction more effective in accomplishing its purpose" (*Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986)). An "agreement" on the price to be charged for Equilon's products – whether that agreement is express or merely attributable to Shell and Texaco based upon their oversight or "control" of Equilon – was indisputably necessary to make Equilon "more effective

in accomplishing its purpose." *Id.* Without an agreement on *some* price for Equilon's products, those products could not have been marketed at all.

The Ninth Circuit nonetheless branded the pricing agreement at issue in this case a "naked" restraint potentially subject to *per se* condemnation, in direct conflict with the decisions Shell has cited. The court did so based solely on the fact that the two brands of gasoline were priced the same (a point addressed below) and the irrelevant fact that Equilon did not create a "new" product or merge the two existing brands into "one collective brand." *See* Pet. 16-17. Respondents' Opposition leaves this clear circuit conflict entirely unaddressed.

Respondents also leave entirely unaddressed the conflict between the Ninth Circuit's decision and the guidelines promulgated by the agencies of the federal government responsible for overseeing enforcement of the antitrust laws. Respondents make no attempt to reconcile the Ninth Circuit's decision with the principles articulated in the *Collaboration Guidelines*, nor could they. Under the *Collaboration Guidelines*, the joint pricing of venture output would have been reviewed under the rule of reason because it was "reasonably necessary" to achieve the procompetitive benefits of an "efficiency-enhancing integration of economic activity." *Collaboration Guidelines* § 3.2. The Ninth Circuit's invocation of the *per se* rule is in direct conflict with this standard and casts substantial doubt on the legality of a joint venture that the Federal Trade Commission itself expressly upheld as lawful. As a result, if there is any doubt about the extent to which the decision below warrants review, the Court should request the views of the Solicitor General on that question.

Respondents attempt to side-step these obvious conflicts by erroneously assuming (as did the Ninth Circuit) that the relevant "agreement" here was the decision to set the *same* price for both brands of gasoline. *See* Br. in Opp. 18

(focusing on the "agreement between Shell and Texaco to equalize the prices at which their respective brands of gasoline would be sold"). Like the Ninth Circuit, Respondents contend that Shell and Texaco were required to show that an agreement to "equalize" the prices for both brands of gasoline was *itself* necessary to achieve the joint venture's efficiencies. The Ninth Circuit's holding on this point is fundamentally wrong and conflicts with decisions of this Court and other circuits as well.

No court has ever held that the *specific price* chosen for a joint venture's products must be reasonably necessary to the venture's success in order for a pricing restraint to be deemed ancillary rather than naked. As Shell demonstrated in its petition, the Ninth Circuit's imposition of such a requirement is flatly inconsistent with this Court's decision in *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979), and the decisions of the First and Eleventh Circuits in *Augusta News* and *National Bancard*. *See* Pet. 12, 14. In each of those cases, the courts asked only whether the decision to agree on *some price* was reasonably necessary to achieve the efficiencies of the venture, not whether the specific price chosen by the joint venture was reasonably necessary. The Ninth Circuit's decision thus dramatically expands the category of restraints that may be subject to *per se* condemnation, again in direct conflict with the decisions Shell has cited. Respondents offer absolutely no response to this point, which stands unrebutted.

B. The Decisions Cited by Respondents Do Not Support Their Position.

Respondents rely on four decisions by this Court in support of their argument that unified pricing of Shell- and Texaco-branded gasoline can be deemed a naked restraint because it was not "necessary" to price the brands the same in order to achieve the joint venture's efficiencies. *See* Br. in Opp. 13-

17. None of the cited cases actually supports Respondents' position.

In *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), the Court applied the *per se* rule only because the purported "joint venture" was a mere sham designed to mask a naked horizontal agreement to allocate territories. *Id.* at 597. Here, it is undisputed that the joint ventures were *bona fide*. *See* Pet. App. 3a ("There is a voluminous record documenting the economic justifications for creating the joint ventures."). In *Broadcast Music*, the Court refused to apply the *per se* rule to the joint ventures' pricing of their blanket licenses, not because the setting of any particular price was necessary to achieve efficiencies, but because the joint ventures themselves created efficiencies and the ventures could not function without setting *some* price for their products. Similarly, in *NCAA*, the Court declined to apply the *per se* rule, not because the alleged *pricing* restraint "[made] possible a new product by reaping otherwise unattainable efficiencies," 468 U.S. at 113, or "may be so efficient that it will increase sellers' aggregate output and thus be procompetitive," *id.* at 103. Rather, the Court declined to apply the *per se* rule simply because the existence of the joint entity involved there (the NCAA) had that result and the pricing restraint was related to the operation of the entity. The same is true here.

In *Citizens Publ'g Co. v. United States*, 394 U.S. 131 (1969), unlike here, the formation of the joint venture did not eliminate competition between the two newspapers in all respects, because each retained its own news and editorial departments. *Id.* at 133. Moreover, to the extent that the 1969 *Citizens Publishing* opinion held that the *per se* rule applied to pricing restraints adopted in the context of an otherwise legitimate joint venture, the opinion was merely a precursor to the now-overruled doctrine of *United States v. Topco Assocs.*, 405 U.S. 596 (1972); as such, it is inconsistent with subsequent decisions by this Court with respect to the

proper scope of the *per se* rule, as several circuits have implicitly recognized. *Augusta News*, 269 F.3d at 48 (noting that, notwithstanding *Topco*, "it is commonly understood today that *per se* condemnation is limited to 'naked' market division agreements, that is, to those that are not part of a larger pro-competitive joint venture"); *Rothery Storage*, 792 F.2d at 224-29 (recognizing that *Topco*'s holding that all horizontal restraints are illegal *per se*, even if they are ancillary to a partnership or joint venture, has been overruled by this Court's decisions in *Broadcast Music*, *NCAA*, and *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985)).

Perhaps most telling is Respondents' misplaced reliance on the comments of Professor Areeda that this Court quoted in *NCAA*. Br. in Opp. 15-16. Professor Areeda's comments, cited with approval by this Court, affirmatively demonstrate that the restraint at issue here is *not* illegal *per se*. In the quoted passage, Professor Areeda hypothesizes a joint venture in which the two dominant automobile manufacturers (undoubtedly holding a combined market share well in excess of 50%) agree to distribute their automobiles through a single selling agent but not otherwise to integrate their businesses. Notwithstanding that those two joint venture partners would certainly have more market power than Shell and Texaco, and notwithstanding the far more limited scope of the joint venture (and hence of any likely efficiencies), Professor Areeda makes clear that the "price fixing" that arose from his hypothetical venture would be subject to the rule of reason, *not* the *per se* rule. This case is a far easier one for rejection of the *per se* rule.

C. The Ninth Circuit's Decision Puts Virtually All Joint Ventures at Risk of *Per Se* Liability.

Respondents' two attempts to minimize the import of the Ninth Circuit's decision fall flat. First, Respondents suggest that the ruling applies only where the joint venture partners,

rather than the joint venture, decide what prices will be charged for the venture's products. Second, Respondents suggest that the ruling applies only where the *same* price is established for more than one product. For the reasons stated above, neither purported limitation is consistent with the decisions of this Court and other circuits, and neither could be relied upon by prospective joint venture partners in forming or implementing an efficiency-enhancing venture.

With respect to the identity of the decision-maker, plaintiffs in other cases will undoubtedly argue – exactly as Respondents have here – that decisions by a joint venture should be attributed to the joint venture partners. To the extent that the partners retain any control or oversight of the management of their venture (as is usually the case), the distinction between decisions by the "joint venture" and by the "joint venture partners" will likely not be a distinction upon which lawyers will feel safe in advising their clients to rely. Companies considering whether to form joint ventures will therefore be forced to assume that any pricing (and other) decisions might be attributed to them as individual competitors rather than to the joint venture. That will have a chilling effect on the formation of joint ventures.

To the extent that the Ninth Circuit's ruling turns on Equilon's decision to charge the *same* price for Shell- and Texaco-branded gasoline, the decision makes no economic or legal sense. As explained in Shell's petition, it would be just as anticompetitive, and just as much *per se* illegal price fixing, for two competitors to agree that one will charge $2.00 for its product while the other charges $1.00 as it would be for both of them to agree to charge $1.50. Thus, under the Ninth Circuit's reasoning, if it is *per se* illegal for joint venture partners to agree to charge the *same* price for two products, it will similarly be *per se* illegal for them to agree to charge two *different* prices for those products as well.

The Ninth Circuit's decision sweeps even more broadly by requiring joint ventures to establish that the *specific* prices

chosen for their products were themselves necessary to achieve the venture's efficiencies in order to avoid *per se* liability. This requirement will severely chill the formation of joint ventures, because the efficiencies generated by such ventures usually arise, not from specific pricing decisions, but, as here, from the consolidation of functions (including the pricing function) and resulting cost savings. If not overturned by this Court, the Ninth Circuit's decision will therefore put at risk of *per se* price-fixing liability every joint venture that sells products that would, if sold by economically separate entities, be competing products.

The *amicus* briefs submitted in support of the petitions for certiorari explain in detail the havoc the Ninth Circuit's decision will create in an important sector of the national economy. *See, e.g.*, Brief of Antitrust Scholars as *Amici Curiae* 18-20. The potentially broad and highly disruptive impact that the Ninth Circuit's decision will have on the formation of procompetitive business enterprises further confirms that review is warranted here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENTS IN RESPONSE TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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H. Hovenkamp, *XI Antitrust Law*, 2d ed., Section 1908b (2005) 6, 9

P. Areeda, *The Rule of Reason, Antitrust Analysis: General Issues* 37-38 (Federal Judicial Center, June 1981) 8

Respondents above-named (hereafter "respondents" or "plaintiffs") submit this supplemental brief in response to the brief for the United States as *amicus curiae* ("United States brief"), which advocates that this Court accept certiorari for the purpose of reversing the decision of the court of appeals in this case.

The Government urges this Court to accept certiorari because the Government claims that the lower court's decision is an "unwarranted expansion of the per se rule" (United States brief, p. 19), which "upsets the previously settled understanding of the scope of per se liability" (*id.*, p. 7), and "chills legitimate and beneficial economic activity by raising the specter of per se liability for efficiency-enhancing joint ventures" (*id.*, p. 17). These contentions are wrong.

The principal problem with the Government's position is that, in order to criticize the court of appeals decision, the Government assumes as true a critical fact in this case, which the petitioners have not only failed to prove, but also affirmatively disclaimed and denied. Repeatedly, throughout its brief, the Government asserts that the price restraint at issue in this case, petitioners' fixing the same price for the Shell and Texaco brands, was "integral" to their joint ventures. (*Id.*, pp. 15, 16, 18, 20 n.1.)

A basic, crucial, and unrefuted fact of this record, however, is that petitioners never claimed that their ventures' identical pricing of the Shell and Texaco brands was integral to the ventures' operations or alleged efficiencies. It was instead a direct restraint on price for which they claimed *no* procompetitive justification. The court of appeals specifically found, "The defendants have thus far failed to offer any explanation of how their unified pricing of the distinct Texaco and Shell brands of gasoline serves to further the ventures' legitimate efforts to produce better products or capitalize on efficiencies. Nor does the record contain facts sufficient to warrant our drawing any such inference." *Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108,

1122 (9th Cir. 2004).[1] For the Government to claim otherwise and maintain that the pricing restraint at issue was "integral" to the ventures' operations is flatly contradicted by the voluminous evidence of record.[2] The Government's entire argument thus rests on a theoretical premise that is contradicted by extensive evidence of record from the mouths of the oil companies' own top executives. As this Court has said, "Legal presumptions that rest on formalistic distinctions, rather than actual market realities, are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.'" *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 449, 466-67 (1992).[3]

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[1] Executives of Shell, Texaco, and both ventures all testified that setting the same price for the Shell and Texaco brands had *absolutely nothing* to do with any claimed efficiencies, competitive benefits, or purposes of the ventures. (*See* deposition testimony of Messrs. Bijur, Tilton, Darnley, Burch, Williams, and Berry in Supplemental Brief Appendix ("App."), pp. 1-12, attached hereto.)

[2] This evidence was in fact provided to the Government by respondents on January 18, 2005. *See* e-mail from respondents' counsel to Antitrust Division enclosing "materials from the Ninth Circuit record showing the testimony that price-fixing had nothing to do with the claimed efficiencies of the joint ventures, and that any cost savings were not passed on to consumers." (App., pp. 13-14, attached hereto.)

[3] Although this is the Government's most crucial misreading of the record, it is not the only one. For example, the Government asserts that respondents constitute "a class of 23,000 gas station owners in the western United States" (United States brief, p. 1); and that "the dispute before this Court involves Equilon, which petitioners formed to own and operate their downstream assets in the western United States," (*Id.*, p. 2), because "the district court granted petitioners summary judgment on all claims related to Motiva . . . " (*Id.* n.3.) The Government is wrong in all particulars. Respondents consist of a *nation-wide* class of Shell and Texaco dealers; the lawsuit involves the oil companies' price fixing for both Equilon and Motiva; and the summary judgment affirmed by the court of appeals relates only to the presence of Saudi Refining, Inc., as a defendant in this action, and not to price fixing by Shell and Texaco with regard to gasoline sales by Motiva. *Dagher*, 369 F.3d at 1110, 1114-16. Likewise, the Government asserts, "Respondents contended that the agreement constituted a per se violation of Section 1 of the Sherman

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The Government's false premise that the pricing restraint at issue was "integral" to the joint ventures wholly vitiates and undermines the Government's argument for granting certiorari. In this case, which admittedly involves a direct restraint on price, not only have the oil companies acknowledged that the restraint was not integral to their ventures; they have also presented *no* evidence of a procompetitive justification for the restraint. In every case in which this Court has considered the lawfulness of a restraint imposed by a joint venture or other collaboration of competitors, this Court has required a showing of procompetitive benefits in order to sustain the lawfulness of the restraint. *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19-24 (1979); *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 103-04, 109-10 (1984); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 690-95 (1978); *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459-61 (1986).

In *Broadcast Music*, this Court denied *per se* treatment for blanket licensing of musical compositions, because the Court found that blanket licensing was integral to creation of "a different product," which carried with it substantial procompetitive benefits. 441 U.S. at 22-23. This Court observed, "Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." 441 U.S. at 23.

Act, 15 U.S.C. 1." (United States brief, p. 2.) This ignores that respondents also premised their "claim on either a *per se* rule or a 'quick look' theory of liability." *Dagher*, 360 F.3d at 1113. The Government claims, further, that the oil companies "transferred all of their domestic downstream assets" to their joint ventures. (United States brief, p. 2.) The Government neglects to mention, however, that "Each [oil company] retained its own trademarks and kept control over its own brands pursuant to separate Brand Management Protocols, each of which prohibited the joint ventures from giving preferential treatment to either brand. Under the joint venture agreements, Equilon and Motiva market Shell and Texaco gasoline under licensing agreements governing both the sale of the products and the use of the Shell and Texaco trademarks." 369 F.3d at 1112.

Here, Shell and Texaco themselves have disclaimed any such necessity for charging the same price for their brands. Moreover, the Shell and Texaco ventures produced no new product, as did ASCAP and BMI, and virtually every other joint venture whose practices have been found lawful under the antitrust laws.

In *NCAA v. Board of Regents*, in holding restraints on the televising of college football to be in violation of Section 1 under a quick look rule of reason, this Court expressly stated that a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis." 468 U.S. at 110. Likewise, in an accompanying footnote, the Court stated:

> The Solicitor General correctly observes:
>
> "There was no need for the respondents to establish monopoly power in any precisely defined market for television programming in order to prove the restraint unreasonable. Both lower courts found . . . the NCAA television restrictions have reduced output, subverted viewer choice, and distorted pricing. *Consequently, unless the controls have some countervailing procompetitive justification, they should be deemed unlawful regardless of whether petitioner has substantial market power over advertising dollars. . . .*" [*Id.*, n.42; emphasis added.]

Here, in supporting a naked restraint on price for which no procompetitive justification is offered, the Government takes exactly the opposite position.[4]

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[4] Also in *NCAA*, this Court provided the following gloss on its decision in *Broadcast Music*:

> While joint ventures have no immunity from the antitrust laws, as *Broadcast Music* indicates, a joint selling arrangement may "mak[e] possible a new product by reaping otherwise unattainable efficiencies."
>
> • • •

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In *Indiana Fed'n of Dentists*, this Court again expressly required a procompetitive justification for a restraint on price or output:

> Absent some countervailing procompetitive virtue – such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services, *see Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., supra*; *Chicago Board of Trade, supra; cf. National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984) – such an agreement limiting consumer choice by impeding the "ordinary give and take of the market place," *National Society of Professional Engineers, supra*, 435 U.S. at 692, 98 S. Ct., at 1365, cannot be sustained under the Rule of Reason. [476 U.S. at 459.]

In *National Soc'y of Prof'l Eng'rs*, this Court also required that any restraint on price or output be justified by a showing of competitive benefits, and said that not doing so while arguing that competition itself was inadvisable was "nothing less than a frontal assault on the basic policy of the Sherman Act." 435 U.S. at 695.

Every significant lower court joint venture decision has followed this Court's directive in requiring a procompetitive justification for restraints on price and output, generally by requiring a showing that any such restraint is ancillary, rather than naked, in the sense that it is reasonably necessary to achieving the efficiencies, benefits, or purposes of the joint venture at issue. *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 214, 224, 229 (D.C. Cir. 1986); *National Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592,

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> In *Broadcast Music*, the availability of a package product that no individual could offer enhanced the total volume of music that was sold.

468 U.S. at 113-14 (footnote omitted). As indicated, the Shell and Texaco ventures produced no new product.

599, 601, 603 (11th Cir. 1986); *see Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 48 (1st Cir. 2001); *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 59 (1st Cir. 2002); *Freeman v. San Diego Bd. of Realtors*, 322 F.3d 1133, 1151 (9th Cir. 2003). This, of course, is exactly the approach followed by the court of appeals in this case. The Government is simply wrong in contending that "[t]he court of appeals compounded its error by applying the ancillary restraints doctrine to this case." (United States brief, p. 13.) *See* H. Hovenkamp, *XI Antitrust Law*, 2d ed., Section 1908b at 253 (2005):

> **Relevance of inclusion in presumptively efficient joint venture or other transaction.** Determining ancillarity requires the tribunal to consider *first* whether any aspect of the defendants' association contains a significant promise of integration or cooperation yielding an increase in output. *Second*, some determination must be made whether the challenged agreement is an essential part of this arrangement, whether it is important but perhaps not essential, or whether it is completely unnecessary.

The Government goes even further astray, urging a doctrinal distinction that does not exist in the case law when it claims that "the court of appeals' decision in this case is the first ruling to apply the ancillary restraints doctrine to constraints on the joint venture's *own* conduct." (United States brief, p. 15, emphasis in original.) To the contrary, the ancillary restraints doctrine has routinely been applied to restraints within joint ventures. *See Broadcast Music, Inc.*, 441 U.S. at 19-24; *Freeman v. San Diego Bd.*, 322 F.3d at 1151; *National Bancard v. Visa*, 779 F.2d at 599, 601, 603.

Moreover, current scholarship regards the court of appeals decision "as a case that applies these generally accepted standards," which "was correctly decided on its current record and should not be considered controversial. It provides helpful guideposts to the types of joint venture activities that trigger antitrust concerns." Bruce D. Sokler, Yee Wah Chin & Kathryn E. Walsh, *A Consideration of Dagher and the Antitrust Standard for Joint Ventures*, 1

NYU Journal of Law and Business 307, 321 (2004). This article further comments:

> In the case of joint venture pricing activities that are not properly ancillary to the venture's legitimate purposes, *per se* illegality may result. From this perspective, *Dagher* is in the mainstream of antitrust jurisprudence and breaks no new ground. The result in *Dagher* represents an unsurprising application of generally accepted antitrust standards to competitor joint ventures.
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> This reliance on fact-specific analysis in the overwhelming majority of cases ensures that beneficial economic activity is unlikely to be deterred by rigid rules of thumb. [*Id.*]

The evidence of record and all of the foregoing authorities show that there is no reason for this Court to grant certiorari to examine a pricing restraint by a joint venture that is neither integral to the venture's operation nor supported by any claimed procompetitive justification. Given the state of the record, the court of appeals holding that the pricing restraint can be *per se* illegal hardly constitutes an "unwarranted expansion of the per se rule," as the Government claims. The court of appeals quite properly concluded that the evidence of record allows a jury to find that Shell and Texaco imposed a direct restraint on the pricing of their brands of gasoline; that the restraint was not integral to the ventures or at all related to the purposes or claimed efficiencies or benefits of the ventures; and that the oil companies have shown no procompetitive justification for the restraint. On this evidence, there is nothing controversial or radical in the court of appeals holding that such a restraint can be subject to *per se* illegality.

Indeed, the issue in this case really is not whether to treat such a pricing restraint under the *per se* rule or the rule of reason, inasmuch as even the rule of reason requires a showing that the restraint at issue is incident to at least some procompetitive benefit. As this Court has

said, if there is a direct restraint on price, "some competitive justification" is required, and where it is not forthcoming, "the rule of reason can sometimes be applied in the twinkling of an eye." *NCAA*, 468 U.S. at 110, n.39, quoting from P. Areeda, *The Rule of Reason, Antitrust Analysis: General Issues*, 37-38 (Federal Judicial Center, June 1981).[5]

Here, however, Shell and Texaco have offered no procompetitive justification whatsoever for their pricing restraint on the Shell and Texaco brands. Hence, whether to apply the rule of reason or the *per se* rule is a non-issue, because Shell and Texaco have abjured proof of any competitive benefit, and their restraint is therefore unlawful whatever standard applies. Nor does the court of appeals decision here create any uncertainty for present or future joint ventures, contrary to the Government's hyperbole. The Government's brief is noteworthy for its failure to name a single joint venture that has demonstrated an actual adverse effect from the Ninth Circuit's decision.

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[5] [FN39.] "The fact that a practice is not categorically unlawful in all or most of its manifestations certainly does not mean that it is universally lawful. For example, joint buying or selling arrangements are not unlawful *per se*, but a court would not hesitate in enjoining a domestic selling arrangement by which, say, Ford and General Motors distributed their automobiles nationally through a single selling agent. Even without a trial, the judge will know that these two large firms are major factors in the automobile market, that such joint selling would eliminate important price competition between them, that they are quite substantial enough to distribute their products independently, and that one can hardly imagine a pro-competitive justification actually probable in fact or strong enough in principle to make this particular joint selling arrangement 'reasonable' under Sherman Act § 1. The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye." P. Areeda, *The Rule of Reason, Antitrust Analysis: General Issues* 37-38 (Federal Judicial Center, June 1981).

Professor Areeda's hypothetical is of course squarely on all fours with the facts of this case, where one need only substitute Shell and Texaco for Ford and General Motors.

Certainly, the Shell and Texaco ventures, which terminated in 2002, before the court of appeals decision, cannot claim uncertainty from the decision. Avoiding liability under the court of appeals decision requires no more than showing that any challenged pricing "is sufficiently important to attaining the lawful objectives of the joint venture that the anticompetitive effects should be disregarded." *Dagher*, 369 F.3d at 1121.[6] This is nothing more than what the law has always required, since *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899); *see* H. Hovenkamp, *XI Antitrust Law*, 2d ed., Section 1908b, at 253-59 (2005).

This case is simply not worthy of certiorari. There is no conflict between the Ninth Circuit's decision and any decision of any other circuit; the Government has shown no circuit split.[7] The decision of the court of appeals is also fully consistent with all prior decisions of this Court.[8] The

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[6] *See, also, Dagher*, n.14, citing, Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1188-89 (2001).

[7] Although the Government claims that joint venture decisions in other circuits "have required joint venture partners to demonstrate the reasonable necessity of restrictions on their own conduct outside the venture," (United States brief, p. 14), this is a claimed distinction that no court has ever articulated, to respondent's knowledge, and that the cases themselves fail to support. *E.g.*, *Freeman v. San Diego Bd.*, 322 F.3d at 1151.

[8] The Government's effort to distinguish *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969) is both legally and factually unpersuasive. In *Citizen Publishing*, this Court affirmed summary judgment for the Government in a Section 1 challenge to a joint venture of newspapers in Tucson, Arizona. The newspapers had entered into a joint operating agreement, the salient features of which were described by the Court as follows:

> The purpose of the agreement was to end any business or commercial competition between the two papers and to that end three types of controls were imposed. First was price fixing. The newspapers were sold and distributed by the circulation department of TNI; commercial advertising placed in the papers was sold only by the advertising department of TNI; the subscription and advertising

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